

LFAs. Moreover, regardless of how the LECs must fill out Form 492A, they still have an obligation under Section 61.45 of the Commission's rules to calculate sharing and LFA amounts consistently with the LEC Price Cap Order. As the Commission noted in the NPRM, the only way to calculate sharing and LFA amounts correctly is to add-back the effect of prior period sharing and LFA amounts.⁴⁷

In their Direct Case, the NTCs demonstrated that the principles established by the court in AT&T v. FCC⁴⁸ require the Commission to include add-back of both sharing and LFA amounts to prevent the price cap backstop mechanism from sharing the fatal flaw that invalidated the automatic refund rule.⁴⁹ MCI incorrectly argues that this case "invalidated the refund rule and nothing else."⁵⁰ In that case, the court established the principle that a regulatory system with an upper limit on earnings must have a remedy for underearnings as well. Otherwise, the system would have a tendency to drive the carriers' earnings levels below the level necessary to remain in business.⁵¹ The Commission addressed this issue in the

⁴⁷ See NPRM at para. 13

⁴⁸ 836 F.2d 1386 (1988).

⁴⁹ See Direct Case of the NTCs at Exhibit 2, pp. 2-4.

⁵⁰ MCI at p. 30.

⁵¹ AT&T misinterprets the NTCs' Direct Case by stating that "NYNEX also claims (*id.*) that, had it not 'normalized' its 1992 earnings by excluding the effects of the prior lower formula adjustment, 'its earnings could be driven below the level that the Commission has defined as confiscatory.'" AT&T at p. 21, n.45. AT&T argues that

LEC Price Cap Order by adopting a backstop mechanism that would prevent the LECs from earning below 10.25 percent, which the Commission defined as the minimum return that a LEC needs to remain in business. Because add-back of LFA amounts is necessary to give a LEC the full benefit of the LFA, it is an essential part of the earnings backstop mechanism.

AT&T argues that add-back is not implicit in the current rules because the Commission "conceded" in the NPRM that it had not addressed this issue in the price cap decisions or rules, and that the NPRM proposes to apply the add-back rule only on a prospective basis.⁵² This is not a proper characterization of the NPRM. The Commission stated in the NPRM that this issue had not been "expressly discussed in the LEC price cap orders nor clearly addressed in our Rules."⁵³ The Commission also stated (1) that add-back is "more consistent with the price cap plan as it was adopted;" (2) that it anticipated that rates of return would continue to be

51 (Footnote Continued From Previous Page)

this statement is inconsistent with the fact that the NTCs' 1992 earnings were in the sharing zone. However, AT&T misquoted the NTCs. In their Direct Case, the NTCs were describing the effects of the price cap system, not the impact on the NTCs. See Direct Case, Exhibit 2, p. 5. In AT&T v. FCC, the court invalidated the automatic refund rule because the system itself would tend to drive earnings below the confiscatory level, and not because it had this effect on any particular carrier. For the same reason, the Commission must apply add-back to LFA amounts to ensure that the price cap system is designed to prevent confiscatory results.

52 AT&T at p. 22.

53 NPRM at para. 4 (emphasis added).

calculated and reported under price caps as they had been under rate of return; (3) that, in discussing changes in rate of return reporting, the Commission did not indicate that the add-back provisions of the Form 492 were to be changed; and (4) that add-back "continues to be an appropriate and indeed probably necessary component" of the price cap backstop mechanism.⁵⁴ The Commission tentatively concluded that add-back should "continue to be part of the rate of return calculations of LECs subject to price caps."⁵⁵ These statements demonstrate the Commission's belief that add-back is required by the price cap rules and that the NPRM simply would clarify that requirement.

The NTCs have shown that add-back is required by (1) the rule that the LECs must compute their rates of return using earned, or normalized, revenues; and (2) the rule that the LECs must calculate sharing and LFA amounts consistently with the backstop mechanism as described in the LEC Price Cap Order. No commenter has shown that it is possible to comply with either the language or the intent of these rules without add-back.

IV. THE LECS SHOULD ASSIGN LIDB PER QUERY CHARGES TO THE LOCAL TRANSPORT SERVICE CATEGORY

While most LECs agree that LIDB per query charges should be assigned to the Local Transport service category, United and Allnet believe that these rates belong in Local

⁵⁴ NPRM at paras. 4, 8, 10, 11.

⁵⁵ NPRM at para. 15 (emphasis added).

Switching. Since the costs and functions of LIDB service include both switching and transport, neither position is entirely incorrect. However, the NTCs demonstrated in their Direct Case that the LIDB services are most closely related to transport, since they are associated with rates for common channel signalling access ("CCSA"), which is in the Local Transport category. Therefore, the Commission should permit the LECs to continue including LIDB rates in the Local Transport category.

The Commission should not adopt AT&T's approach, which is to establish a new service category for LIDB charges.⁵⁶ AT&T argues that the Commission should require a separate price cap category for each Part 69 rate element. This would not be good policy. In the LEC Price Cap Order, the Commission carefully balanced the need for pricing flexibility with the need for ratepayer protection. Establishing a separate service category for each Part 69 rate element would allow almost no pricing flexibility and it would revert to the previous rate of return regime under which most rate elements were the result of regulatory formulas. The Commission should not establish new service categories without good reason. No such reason has been shown here.

⁵⁶ See AT&T at pp. 37-40.

V. CONCLUSION

For the foregoing reasons, the Commission should reject the oppositions to the NTCs' 1993 Annual Access tariff filing. -

Respectfully submitted,

New York Telephone Company
and
New England Telephone and
Telegraph Company

By: Campbell L. Ayling
Edward R. Wholl
Campbell L. Ayling
Joseph Di Bella

120 Bloomingdale Road
White Plains, NY 10605
914-644-5637

Their Attorneys

Dated: September 10, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY OF
THE NYNEX TELEPHONE COMPANIES, was served by first class United
States mail, postage prepaid, on each of the parties indicated
on the attached service list, this 10th day of September, 1993.


LAUREN A. SHIELDS

James S. Blaszak
Francis E. Fletcher, Jr.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 - East Tower
Washington, D.C. 20005
FOR: AD HOC TELECOMMUNICATIONS
USERS COMMITTEE

Francine J. Berry
Robert J. McKee
Peter H. Jacoby
Judy Sello
AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

Jay C. Keithley
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036
FOR: UNITED/CENTRAL TELEPHONE COMPANIES

W. Richard Morris
P.O. Box 11315
Kansas City, MO 64112
FOR: UNITED/CENTRAL TELEPHONE COMPANIES

J. Scott Nicholls
ALLNET COMMUNICATIONS SERVICES, INC.
1990 M Street, N.W., Suite 500
Washington, D.C. 20036

Michael F. Hydock
Randy Klaus
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
FOR: MCI TELECOMMUNICATIONS CORP.